Supreme Court, U.S.
FILED
AUG 30 1991
OFFICE OF THE CLERK

Case No. 91-223

SUPREME COURT

OF THE UNITED STATES

October Term, 1991

JUGRAJ SINGH DHALIWAL,

Petitioner,

v.

WOODS DIVISION OF HESSTON CORP., DAVID SCHIRER, and MICHAEL DAWSON,

Respondents.

Petition for Writ of Certiorari
to the United States
Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether any special and important reasons exist for this Court to exercise its discretionary jurisdiction to review the District Court's decision enforcing the settlement agreement between Petitioner and Respondents (responding to Petitioner's Questions 1, 2, and 3).

2. Whether any special and important reasons exist for this Court to exercise its discretionary jurisdiction to review the District Court's decision granting Defendant's Petition for Attorneys' Fees (responding to Petitioner's Question 4).

3. Whether any special and important reasons exist for this Court to

exercise its discretionary jurisdiction to review the District Court's decision granting Petitioner's attorney's Motion to Withdraw (responding to Petitioner's Question 5).

4. Whether any special and important reasons exist for this Court to exercise its discretionary jurisdiction to review the District Court's decision denying Petitioner's Motion for Appointment of Counsel (responding to Petitioner's Question 6).

LIST OF PARTIES

Petitioner is Jugraj Singh Dhaliwal.

Respondents are Woods Division of Hesston Corporation,[1] David Schirer, and Michael Dawson.

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[1]Woods Division is no longer a division of Hesston Corp., which has been acquired by another entity. Woods Division is now a division of Fiatallis North America, Inc., which is a wholly-owned subsidiary of Fiat, S.p.A.

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CITATIONS OF LOWER COURT OPINIONS AND JUDGMENTS

The Memorandum Opinion and Order, dated April 12, 1990, by which Judge Roszkowski of the Northern District of Illinois enforced the settlement agreement in Case No. 86-C-20375, is unreported, but is reproduced in the Petition for Writ of Certiorari, pages A-15 to A-24. Judge Roszkowski's Order granting Defendant Woods Division's Petition for Attorneys' Fees and Supplemental Petition for Attorneys' Fees is unreported, but is reproduced in the Petition for Writ of Certiorari, pages A-25 to A-28.

Petitioner's appeal of the Order enforcing the settlement agreement, of the Order granting Plaintiff's attorneys' Motion to Withdraw, and of the Order

granting Respondent Woods Division attorneys' fees were consolidated with Respondents' cross-appeal in the United States Court of Appeals for the Seventh Circuit, Case Nos. 90-2212, 90-2259, 90-2357. The Court of Appeals affirmed the District Court regarding Petitioner's appeals in an unpublished decision ("Seventh Circuit Opinion"), which is reproduced in the Petition at pp. A-3 to A-10, and at 1991 U.S. App. LEXIS 14745, and is cited in a Table at 930 F.2d 58. The Court of Appeals affirmed the District Court regarding Respondent's cross-appeal in a published decision reproduced in the Petition, pages A-10 to A-14, and at 931 F.2d 547. The Court of Appeals denied Petitioner's Petition for Rehearing in an

unpublished decision found at 1991 U.S. App. LEXIS 10,612.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit denied Petitioner's Petition for Rehearing in an Order dated May 17, 1991. Petitioner moved to stay the issuance of the mandate. The Court of Appeals denied the motion in an Order dated July 12, 1991, and its mandate issued on July 18, 1991. Petitioner's Petition for Writ of Certiorari is dated July 31, 1991, and was filed in this Court and received by Respondent on August 5, 1991.

Petitioner claims jurisdiction based on 28 U.S.C. §1254(1).

RELEVANT STATUTES

...

"Upon application by the complainant and in such circumstances as the the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security." 42 U.S.C. §2000e-5(f)(1).

STATEMENT OF CASE

The Equal Employment Opportunity Commission found no reasonable cause to believe that the allegations in Petitioner's charge were true. Petitioner's Complaint in the Northern District of Illinois, Western Division, dated August 25, 1986, alleged that Respondent Woods Division, Hesston Corp., and the other Respondents, its alleged agents, discriminated against him in his employment because of his national origin (India) and his alien status.

On October 25, 1989, Plaintiff and his attorney at that time, Brian P. Reese, and Attorneys Henry J. Close and Diane Klock and representatives of Defendants, Bo Vanman and Fred Scharer, held a

pretrial settlement conference with District Judge Stanley J. Roszkowski. (Memorandum Opinion and Order ("Opinion"), found in Appendix attached to end of the Petition for Writ of Certiorari ("Petition"), pp. A-16, A-18, and A-19, cited as "Opinion, Petition, pp. A-16, A-18, and A-19"). At this conference, Defendants and Plaintiff orally agreed that the case would be settled on the following terms: Defendants' payment to Plaintiff of Twelve Thousand and no/100 Dollars ($12,000.00) in cash, no admission of liability by Defendants, and no reinstatement for Plaintiff. Id. "[T]he foundation for a settlement was agreed to in the presence of [the District] Court." Id. at A-19.

Defendants' counsel presented to Plaintiff and his counsel a draft written document memorializing the terms of the oral agreement reached on October 25, 1989. (Opinion, Petition, A-19). Plaintiff refused to execute the draft document, claiming that he had not agreed to a provision in the draft that barred him from reapplying to Defendant Woods or any of its related parties at any location. Defendants and Plaintiff could not agree on a written document that reflected their oral agreement. (Opinion, Petition, p. A-20).

Defendant Woods petitioned to enforce the settlement agreement and for attorneys' fees because Plaintiff refused to comply with the settlement agreement.

The fees requested were for preparation for court appearances, and court appearances and status conferences on January 3 and 31, February 14, and April 9, 1990. The attorneys' fee petitions were supported by affidavits.

On January 3, 1990, the District Court also granted Petitioner's attorney's motion to withdraw. The District Court denied Petitioner's motion requesting that the District Court appoint him counsel on February 2, 1990, stating that Petitioner had admitted he could afford to pay counsel.

SUMMARY OF ARGUMENT

I. NO SERIOUS AND IMPORTANT QUESTION JUSTIFIES REVIEW OF THE ENFORCEMENT OF THE SETTLEMENT AGREEMENT

A. The Lower Courts Committed No Factual Error By Enforcing the Settlement Agreement

Under relevant law, repudiation of a settlement agreement of a Title VII suit requires an unequivocal declaration of intent by the party not to perform. A mere inconsistency in draft written settlement agreements is not such an unequivocal declaration.

Petitioner, on the other hand, contends that Respondent repudiated the oral settlement agreement by including a disputed provision in the draft written agreement (barring Petitioner from reapplying to work for Respondent), and

contends that he therefore has no further obligations under that agreement. Since the District Court did not enforce the disputed provision against Petitioner, Petitioner has not been harmed by it.

Moreover, the District Court found as a fact that Petitioner was seeking to avoid the agreement by demanding more money and that Respondent, which moved to enforce the settlement agreement, had not been seeking to avoid the agreement. Petitioner, despite his purported objection to the disputed provision, has never offered to sign the settlement agreement without it. Respondent has never denied the settlement agreement or threatened not to pay the agreed amount. Finally, the fact that Petitioner waited

to ask for more money until after Respondent included the disputed provision in the draft settlement agreement is irrelevant, because Respondent has failed to meet his burden of showing that Petitioner repudiated the agreement by including the draft provision.

B. The Lower Courts Committed No Legal Error By Enforcing The Settlement Agreement

Petitioner does not dispute the applicable legal standard to show repudiation of a settlement agreement, which requires an unequivocal declaration of intent not to perform. Petitioner admits that Respondents made no such declaration.

Respondents would not have repudiated the oral settlement agreement even if,

contrary to the facts, they had stated they would not execute a written agreement unless it contained the disputed provision. The oral settlement agreement did not require the execution of a written settlement agreement, so refusing to execute one would not have declared an intent not to perform the oral settlement agreement.

C. This Case Does Not Justify Discretionary Review

This case turns on the resolution of disputed facts. None of the factors justifying discretionary review are present here, and the departure "from the accepted and usual course of judicial proceedings" alleged by Petitioner is nothing more than a reiteration of

Petitioner's disagreement with the lower courts' factual conclusions.

II. NO SERIOUS AND IMPORTANT QUESTION REQUIRES REVIEW OF THE AWARD OF ATTORNEY'S FEES TO RESPONDENTS

The District Court clearly has the authority to award attorney's fees as a sanction for avoiding a settlement. Petitioner's arguments for the impropriety of the award are nothing more than factual quibbles with the findings of the District Court and Court of Appeals.

III. NO SERIOUS AND IMPORTANT QUESTION EXISTS AS TO ALLOWING PLAINTIFF'S ATTORNEY TO WITHDRAW

The District Court did not abuse its discretion by allowing Petitioner's attorney, who disagreed with Petitioner regarding settlement, to withdraw. The opportunity to respond to his attorney's

withdrawal motion that Petitioner seeks would have been futile, since it would further point out the disagreement. Seventh Circuit Rule 51(a), which requires notice to the client when court-appointed counsel withdraws on the basis that an appeal is frivolous, does not apply since Petitioner's former counsel was private counsel who withdrew in the District Court on the basis that he disagreed with Petitioner regarding settlement.

IV. THE DISTRICT COURT'S REFUSAL TO APPOINT COUNSEL FOR PLAINTIFF RAISES NO SERIOUS OR IMPORTANT ISSUE

Of the three factors required to be satisfied before appointing counsel, Petitioner fails to satisfy two. Petitioner is fully able to pay counsel. Moreover, as found by the EEOC, his

lawsuit is not meritorious. The District Court therefore did not abuse its discretion by refusing to appoint counsel for Petitioner.

ARGUMENT

I. NO SERIOUS AND IMPORTANT QUESTION JUSTIFIES REVIEW OF THE ENFORCEMENT OF THE SETTLEMENT AGREEMENT

A. The Lower Courts Committed No Factual Error By Enforcing The Settlement Agreement

A settlement of a Title VII claim that is knowingly and voluntarily made is binding on the parties. Taylor v. Gordon Flesch Co., 793 F.2d 858, 862 (7th Cir. 1986); Glass v. Rock Island Refining Corp., 788 F.2d 450, 454-55 (7th Cir. 1986). Such a binding agreement is not repudiated unless a party unequivocally declares his intent not to perform under the agreement. Taylor, 793 F.2d at 864.

The Taylor court held that a conflict in the terms of the draft agreements prepared by the different parties did not

show an unequivocal declaration of intent not to perform. Taylor, 793 F.2d at 864. The court said:

> "[A]ny inconsistency which existed clearly did not amount to an expression by the Company that it did not intend to perform its obligations under the oral settlement agreement." Taylor, 793 F.2d at 864.

In this case, the District Court found as a fact, after an evidentiary hearing, that on October 25, 1989 the parties had orally agreed to a settlement as follows:

1. Respondent Woods would pay Petitioner $12,000;

2. Respondents would not admit liability; and

3. Petitioner would not be reinstated. (Opinion, Petition, p. A-19).

The Court of Appeals affirmed the District Court's finding of facts.

The District Court also decided to exclude from the written settlement agreement it confirmed a provision barring Petitioner from reapplying to Respondent Woods. The District Court stated that Petitioner had not explicitly agreed to the provision. This question was raised in Respondent's cross-appeal, and the Court of Appeals also affirmed the District Court on that question. Respondent did not seek rehearing in the Court of Appeals concerning this issue and has not filed a cross-petition in this Court.

Petitioner, while admitting that he agreed to a settlement with Respondents,

contends that he never agreed to a settlement provision barring him from reapplying to Respondent Woods. Petitioner was not injured by the disputed provision because it was not included in the settlement agreement enforced by the District Court and upheld by the Court of Appeals.

Petitioner also contends, however, that Respondent repudiated the oral settlement agreement by including the bar to reapplication in a draft agreement, and that this repudiation gave Petitioner the right to reject the entire oral settlement agreement, to which he admits he agreed. This core contention is the basis of the Petition.

This contention is incorrect. The record shows that, after the oral settlement agreement was reached, Petitioner refused to sign a settlement agreement and Respondents moved the District Court to enforce the settlement agreement. (Seventh Circuit Opinion, Petition, p. A-8). Respondent consistently took the position that the settlement agreement should be enforced with the disputed provision. Petitioner just as consistently took the position that he was not bound by the agreement at all because Respondents included a provision he disputed.

Even under Petitioner's wildly inaccurate version of the facts, Respondent did nothing more than send a

draft settlement agreement and argue that its provisions were part of the agreement. Respondent never stated that it would not pay the settlement amount or that the deal was off. (Seventh Circuit Opinion, Petition, p. A-8).

Petitioner, on the other hand, determined on reflection that he was entitled to more money. (Opinion, Petition, p. A-17; Seventh Circuit Opinion, Petition, p. A-8). This determination came shortly after the oral settlement agreement was reached on October 25, 1989, since Petitioner "placed his demand for higher compensation on January 3, 1990." (Petition, p. 12). Yet, in the face of these facts, Petitioner maintains that Respondents

repudiated the settlement agreement and that he is now free to seek more money.

Petitioner's objections based on the disputed provision are therefore a sham to cover his determination to get more money. Petitioner has never offered to execute the settlement agreement without the disputed provision. (Seventh Circuit Opinion, Petition, p. A-8).

Petitioner also wastes considerable ink arguing that he did not try to avoid enforcement of the oral settlement, because he did not demand more money immediately after the agreement. Since Petitioner has not carried his burden of showing that Respondents repudiated the

settlement agreement, his alleged forbearance is irrelevant.[2]

B. The Lower Courts Committed No Legal Error By Enforcing The Settlement Agreement

The applicable legal standard is actually undisputed. Although Petitioner calls the Appellate Court's standard for repudiation (requiring an unequivocal declaration of intent not to perform) "rather puzzling because it seems to

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[2]Respondent also strenuously objects to Petitioner's attempt to argue to this Court based on irrelevant documents never presented to any court below, or even to this Court. (See references to the following: to Defendants' February 7, 1990 letter to Plaintiff (Petition, p. 8); to February 3, 1990 letter from Plaintiff to Defendants (Petition, pp. 9, 12); and to Defendants' letter of February 7, 1990 (Petition, p. 12)). Petitioner's descriptions of these documents, which are not in the record, are inaccurate and misleading.

justify the [Respondents'] actions of including a not agreed-to-term," he proposes no other standard and has cited the same cases relied upon by Respondent below. Petition, pp. 10-11, 13-14.

Petitioner even admits that "Defendants did not unequivocally declare their intent not to perform." Petition, p. 16. Even though Petitioner inaccurately claims that Respondents said they would not execute an agreement without the disputed provision, such a statement would not be a declaration of intent not to perform the oral settlement agreement, even if it had been made (which it was not). Petitioner has never contended, and no court has found, that the oral settlement agreement required an

agreed written document before it was final. In the absence of that kind of provision, the failure to arrive at such a written agreement "simply leaves an agreement which, if not honored, a party will be forced to protect by proving the existence and terms of the oral agreement. Though in practical terms this proof may be difficult to make, the oral agreement is no less binding." Taylor, 793 F.2d at 862. Consequently, even if Respondents had refused to execute the agreement without the disputed term, such a refusal would not have declared their intention not to perform the oral agreement, because the oral agreement did not have a term requiring the execution of a written agreement.

C. This Case Does Not Justify Discretionary Review

This case would present no serious and important questions under Supreme Court Rule 10.1, even if Petitioner's legal and factual arguments were correct. First, this case turns on the specific facts of one situation. The lower courts relied heavily on the facts about the content of the oral agreement, and the finding that Respondents did not repudiate the oral agreement. The District Court actually observed the "foundations" for the oral agreement. This Court would not be in a better position than the District Court to address such factual questions, and should not exercise its discretion to attempt to

do so.

Second, none of the reasons that support the exercise of the Court's discretion are present. See Supreme Court Rule 10.1. Of those reasons listed in Rule 10.1, Petitioner argues only that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Rule 10.1.(a); Petition, p. 7. On examination, these "departures" from the "accepted course" are nothing more than Petitioner's contentions that, as a matter of fact, the lower courts should have found that Respondents really repudiated the settlement agreement.

Petitioner points to no conflict among circuits, and no conflict with the state courts. No question of law exists: Petitioner does not dispute the legal standards employed by the lower courts.

II. NO SERIOUS AND IMPORTANT QUESTION REQUIRES REVIEW OF THE AWARD OF ATTORNEY'S FEES TO RESPONDENTS

The District Court clearly had the inherent power to enforce settlements by an award of attorneys' fees. DeBose v. Mueller, 552 F. Supp. 307 (N.D. Ill. 1982).

The District Court found that the October 25, 1989 settlement agreement had resolved all issues in the case and that Petitioner later failed to abide by that agreement. (Order dated May 31, 1990, Petition, p. A-26). The Court of Appeals

found no abuse of discretion in that decision, holding that the record showed Petitioner:

> "sought to escape from the entire agreement as a result of the inclusion of this term [barring reapplication]. In light of this fact and Mr. Dhaliwal's contention that he was entitled to a greater sum of money than contained in the settlement, the district court did not abuse its discretion by awarding attorneys' fees to the [Respondents]." (April 16, 1991 Order of Seventh Circuit ("Seventh Circuit Order"), Petition, p. A-9).

Petitioner again argues that, because Respondents included a disputed term in the draft written agreement, he was entitled to ignore the entire settlement agreement. (Petition, p. 17). Both lower courts correctly rejected this argument and concluded that Petitioner's attempts to avoid complying with the settlement

agreement supported an award for attorneys' fees.

Petitioner also argues that the Court of Appeal's affirmance of the award of attorneys' fees conflicts with its finding "that [Petitioner's] refusal was not made in subjective bad faith." (Petition, p. 17). Actually, the Court of Appeals merely concluded that Petitioner's "refusal to sign the memorialized settlement agreement arguably was not made in subjective bad faith." (Seventh Circuit Order, Petition, p. A-9 (emphasis added)). Moreover, subjective bad faith is not required. The DeBose court made no finding of subjective bad faith before awarding attorneys' fees for failure to comply with an oral settlement agreement.

DeBose, 552 F. Supp. at. 308.

III. NO SERIOUS AND IMPORTANT QUESTION EXISTS ABOUT ALLOWING PLAINTIFF'S ATTORNEY TO WITHDRAW

"The grant or denial of an attorney's motion to withdraw in a civil case is a matter addressed to the discretion of the trial court and will be reversed on appeal only when the trial court has abused its discretion." Washington v. Sherwin Real Estate, Inc., 694 F.2d 1081, 1087 (7th Cir. 1982). Such an abuse occurs only "where no reasonable man could agree with the district court; if reasonable men could differ as to the propriety of the court's action, no abuse of discretion has been shown." Washington, 694 F.2d at 1087. The District Court granted Petitioner's attorney's motion to withdraw

on the basis that he disagreed with Petitioner concerning Petitioner's attempt to renege on the settlement agreement. Under Washington, an attorney should be permitted to withdraw when he disagrees with his client about a settlement. Washington, 694 F.2d at 1087. Based on the evidence received by the District Court, the District Court's action was more than reasonable.

Petitioner now seems to be arguing for the first time in any court that he should have had an opportunity to respond to his attorney's motion to withdraw (Petition, p. 18), so that the District Court could discern the actual reason Plaintiff's counsel moved to withdraw. Clearly, no judicial purpose would have been served by

such an absurd proceeding. Any opposition by Petitioner to his counsel's withdrawal based on the circumstances of settlement would have <u>further</u> shown the disagreement between counsel and client regarding settlement. Petitioner has never stated any other basis on which he would have opposed withdrawal.

Petitioner does not even contend that his attorney should not have been allowed to withdraw - only that he should have been allowed to respond to the Motion for Withdrawal. His basis for requiring such an opportunity appears to be Rule 51(a) of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit. Rule 51(a) requires the Seventh Circuit clerk to notify a client when

court-appointed counsel move to withdraw on the basis that a suit is frivolous. Since Petitioner's counsel did not withdraw while this case was in the Court of Appeals, his counsel was not court-appointed, and Petitioner's counsel did not withdraw on the basis that the suit was frivolous, Rule 51(a) is no help to Petitioner.

Accordingly, the Court should not exercise its discretionary jurisdiction to review this issue.

IV. THE DISTRICT COURT'S REFUSAL TO APPOINT COUNSEL FOR PLAINTIFF RAISES NO SERIOUS OR IMPORTANT ISSUE

Respondent believes that Petitioner purports to rely on 42 U.S.C. §2000e-5(f)(1). Petition, p. 19. As Petitioner admits, appointment of counsel under this

statute is within the court's discretion. §2000e-5(f)(1). The District Court properly refused to exercise that discretion to appoint counsel for Petitioner.

By his own admission, Petitioner fails to qualify for appointed counsel.

> "In considering whether to appoint counsel, the Court must consider three factors: (1) the plaintiff's financial ability to retain counsel; (2) the plaintiff's diligence in attempting to obtain counsel; and (3) the merits of the plaintiff's claim. Any one of these factors alone may be determinative.
>
> ...
>
> Because all three factors should be satisfied before counsel is appointed, the Court denied plaintiff's motions for appointment of counsel." Adams v. Lever Brothers Co., 734 F. Supp. 815 (N.D.Ill. 1990).

The plaintiff seeking appointed counsel must show financial inability to

pay counsel. Arnold v. Speedgrip Chuck, Inc., 524 F. Supp. 679, 681 (N.D.Ind. 1981). "The fact that it is merely burdensome to pay counsel is not sufficient." Arnold, 524 F. Supp. at 681.

Here, Petitioner has admitted in every court that he is able to pay counsel. Petitioner again admits his ability to pay to this Court. (Petition, p. 19).

Petitioner also fails to qualify for appointed counsel because his claim is not meritorious, despite his claim that "his case is very strong." (Petition, p. 19). Courts rely on the EEOC's findings to help determine whether a case is meritorious. Robinson v. Western Electric, 3 Empl. Prac. Dec. (CCH) ¶8240, 3 Fair Empl. Prac. Cas. (BNA) 846 (7th Cir. 1971). In this

case, the EEOC found no reasonable cause to believe Mr. Dhaliwal's allegations were true.

Since Petitioner fails on at least two of the three required factors to be considered in appointing counsel, the District Court did not abuse its discretion in denying Petitioner appointed counsel.

CONCLUSION

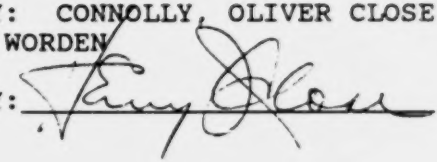
Petitioner not only fails to raise any serious and important question justifying a writ of certiorari, he fails to show any error by the Court of Appeals in affirming the District Court. This Court should therefore deny the writ.

Respectfully submitted,

Respondents

WOODS DIVISION, HESSTON CORP., DAVID SCHIRER, and MICHAEL DAWSON

BY: CONNOLLY, OLIVER CLOSE & WORDEN

BY: 

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Dated: August 30, 1991

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused to be placed in the United States mail, with first-class postage prepaid, to:

Jugraj Singh Dhaliwal
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Los Banos, CA 93635

three copies of the foregoing Brief In Opposition To Petition For Certiorari on August 30, 1991. All required parties have been served. The attorneys' are:

For Petitioner
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